



Media Crackdown in Kazakhstan

The cases of *Vzglyad*, *Respublika*, *Stan TV*, and *K-plyus*

Legal Report

New York
July 31, 2013

Legal report prepared by:
Human Rights Foundation

Publication date: July 31, 2013

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Executive Summary

In December 2012, the government of Kazakhstan banned all publications, broadcasts, and dissemination of information by the newspapers *Respublika* and *Vzglyad*, and TV stations *K-plyus* and *Stan TV*, along with all associated websites. This media crackdown was based on their critical coverage of a labor strike that took place one year earlier in the Kazakhstani town of Zhanaozen, where, on December 16, 2011, in a violent clash between police and striking oil workers, police killed at least 15 protestors and 100 people were injured.

In the last few years, Kazakhstan has systematically restricted the right to freedom of expression within its territory. Under the more than two-decade long rule of President Nursultan Nazarbayev, the country has endured serious irregularities in its electoral processes, as well as the harassment and prosecution of opposition leaders, human rights defenders, journalists, and media outlets. Following the events of Zhanaozen, the government of Kazakhstan has used all critical speech made during the strike as grounds for prosecution of political opposition figures and the independent media.

The court decisions that banned *K-plyus*, *Stan TV*, *Respublika*, and *Vzglyad* were based on a prior ruling on the case of Vladimir Kozlov, a Kazakhstani opposition leader who was wrongfully prosecuted and convicted in connection to the events in Zhanaozen. The criminal charges filed against these mass media outlets included, among others: extremism in the form of incitement to social discord and propaganda of violent government take-over (Article 1(5) of the Law on Countermeasures against Extremism); breach of the prohibition for activities aimed at incitement to social discord in the form of national threats, as well as the distribution of materials undermining national security (Article 5(6) and Article 22(5)(2) of the Law on National Security); and breach of the prohibition for all propaganda and activism promoting the violent change of the constitutional systems, as well as propaganda of social, national, class, or tribal superiority, and any actions capable of upsetting inter-ethnic peace (Article 20(3) and Article 39(2) of the Constitution of the Republic of Kazakhstan).

According to international human rights law, the right to freedom of expression protects all forms of expression and the means of their dissemination. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political discourse, commentary on one's own and public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. Means of expression include books, newspapers, pamphlets, posters, banners, dress, and legal submissions. They also include all forms of audio-visual, electronic, and internet-based modes of expression.

Under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" (incitement prohibition). Under the ICCPR, government measures implementing the Article 20 incitement prohibition require a high threshold because, as a matter of fundamental principle,

limitation of speech must always remain an exception. Such a threshold must be read in consonance with the Article 19(3) three-prong test for restrictions—namely, such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest.

The court decisions banning all publications, broadcasts, and dissemination of information by the newspapers *Respublika* and *Vzglyad* and TV stations *K-plyus* and *Stan TV* (along with all associated websites) as the speech-restrictive measure adopted by the State of Kazakhstan in order to prohibit incitement, failed to meet this three-prong test under the ICCPR. The criminal charges filed against these mass media outlets are based on unclear and overly broad legal provisions that restrict speech in a wide or untargeted way, specially when this speech may be found to be offensive, shocking, disturbing, or merely critical of the government.

The government of Kazakhstan failed to demonstrate at all times that the aforementioned legal provisions were clearly and narrowly defined to protect a legitimate government interest and respond to a pressing social need, especially considering society's interest to remain informed and aware of news in the public domain—such as the Zhanaozen labor strike—as well as the important role the media must play in a democratic society through broadcasting and publishing opinions and news about issues concerning figures in the public and political domain.

By failing the three-prong test for the legitimate prohibition of incitement, Kazakhstan violated the international standard for the protection of the right to freedom of expression. Specifically, Kazakhstan violated (1) the right of the media outlets to freely express opinions and ideas, even when these are offensive, shocking, or disturbing; (2) the general prohibition against the criminalization of expression, especially that directed at public officials; and (3) the right of the public to disseminate opinions or ideas freely, through any medium whatsoever.

This international standard is binding upon Kazakhstan since January 24, 2006, when the country ratified the ICCPR. Through its actions, Kazakhstan failed, and continues to fail, to comply with its obligation to protect freedom of expression under the ICCPR.

A. Background

a. The Zhanaozen strike and subsequent crackdown on opposition and independent media

On December 16, 2011, in a violent clash between police and striking oil workers in the town of Zhanaozen, Kazakhstan, police killed at least 15 protesters and injured 100 more. This event is widely referred to as the “Zhanaozen Massacre.” A government-appointed committee investigated the events, resulting in the prosecution, conviction, and sentencing of five to seven years imprisonment of five high-ranking police officers who were held responsible for the killings and charged with “exceeding power or official authority” (Article 308 of Kazakhstan’s Criminal Code “KCC”). The investigation also led to the sentencing of at least five Zhanaozen businessmen and public officials to two to ten years of imprisonment for “abuse of office” and “embezzlement,” all in connection with mismanagement of the oil company that led to the strike.¹

However, the investigation also led to the prosecution of 37 oil workers, who were charged with various crimes that included “incitement to social, national, tribal, racial, or religious enmity” (Article 164, KCC), and “mass unrest” (Article 241, KCC). Three of the 37 strikers were acquitted, 16 were released on probation, five were

Authors’ note: The translation of all court decisions cited in this report was commissioned by HRF.

¹ See Civic Solidarity, International Monitoring Mission: Report on the Zhanaozen Oil Workers’ Trial. September 2012. Available at: <http://www.civicsolidarity.org/article/573/international-monitoring-mission-finds-trial-kazakhstan-workers-unfair> (Last retrieved on July 30, 2013).

This report states that the number of people killed in the events in connection to the Zhanaozen events is 15. However, the number varies in both media and other civil society reports.

See also news report from *The New York Times*, from December 16, 2011, “At least 10 die as police clash with strikers in Kazakhstan.” Available at:

http://www.nytimes.com/2011/12/17/world/asia/deaths-in-rare-violence-in-kazakhstan.html?_r=0 (Last retrieved on July 30, 2013).

See also news report from *The Guardian*, from December 18, 2011, “Kazakhstan protesters face armed police after bloody clashes.” Available at:

<http://www.guardian.co.uk/world/2011/dec/18/kazakhstan-protesters-armed-police-clashes> (Last retrieved on July 30, 2013).

See also news report from *The Telegraph*, from December 19, 2011, “Riots in western Kazakhstan could destabilize the country.” Available at:

<http://www.telegraph.co.uk/news/worldnews/asia/kazakhstan/8964991/Riots-in-western-Kazakhstan-could-destabilise-the-country.html>

(Last retrieved on July 30, 2013).

See also news report from *Eurasianet*, from December 21, 2011, “Kazakhstan: Violence in Zhanaozen threatens Nazarbayev legacy.” Available at: <http://www.eurasianet.org/node/64745>

(Last retrieved on July 30, 2013).

See also news report from *The New York Times*, from September 10, 2012, “Kazakhstan is accused of abusing oil workers.” Available at:

<http://www.nytimes.com/2012/09/10/world/asia/human-rights-watch-report-says-kazakhstan-abuses-oil-workers.html> (Last retrieved on July 30, 2013).

convicted and sentenced to two to three years in prison and were subsequently pardoned, and 13 were convicted and sentenced to three to seven years in prison.²

The government of Kazakhstan has since used all critical speech made during the Zhanaozen strike as grounds for the prosecution of political opposition figures and the independent media on charges of “incitement,” “exhortation,” or “agitation” to overthrow the government.³

b. The state of freedom of expression in Kazakhstan

Over the more than two-decades long rule of President Nursultan Nazarbayev, Kazakhstan has systematically restricted the right to freedom of expression within its territory. During this time, the country has endured serious irregularities in its electoral processes,⁴ as well as the harassment and prosecution of opposition leaders,⁵ human rights defenders,⁶ journalists, and media outlets.⁷

² See news release from *Human Rights Watch* from March 26, 2012, “Kazakhstan: Ensure fair trial for oil workers, others.” Available at: <http://www.hrw.org/news/2012/03/26/kazakhstan-ensure-fair-trial-oil-workers-others> (Last retrieved on July 30, 2013).

See news report from *Eurasianet* from March 27, 2012, “Kazakhstan: Zhanaozen Trial Opens in Tense Atmosphere.” Available at: <http://www.eurasianet.org/node/65184> (Last retrieved on July 30, 2013).

See news release from *Human Rights Watch* from June 29 2012, “Kazakhstan: Justify Charges Against Activists, Oil Worker.” Available at: <http://www.hrw.org/news/2012/06/29/kazakhstan-justify-charges-against-activists-oil-worker> (Last retrieved on July 30, 2013).

See Human Rights Watch, *Striking Oil, Striking Workers*. Available at: http://www.hrw.org/sites/default/files/reports/kazakhstan0912ForUpload_0.pdf (Last retrieved on July 30, 2013).

See news report from *Eurasianet* from August 6, 2012, “Kazakhstan: Thirteen still behind bars after Zhanahozen appeal.” Available at: <http://www.eurasianet.org/node/65754> (Last retrieved on July 30, 2013).

³ See news report from the *BBC* from March 9, 2013, “Kazakhstan’s independent media under fire.” Available at: <http://www.bbc.co.uk/news/world-asia-21612748> (Last retrieved on July 30, 2013).

See also news report from *Radio Free Europe* from December 16, 2012, “A year after deadly riots, Zhanaozen is quiet but angry.” Available at: <http://www.rferl.org/content/zhanaozen-a-year-after-the-riots/24798726.html> (Last retrieved on July 30, 2013).

⁴ See OSCE/ODIHR, *Election Observation Mission Final Report*. April 3, 2012. Available at: <http://www.osce.org/odihr/elections/89401> (Last retrieved on July 30, 2013).

See also Human Rights Watch, *World Report 2013: Events of 2012*. Available at: <http://www.hrw.org/sites/default/files/reports/wr2013.pdf> (Last retrieved on July 30, 2013).

⁵ See European Parliament’s resolution on the human rights situation in Kazakhstan (2013/2600(RSP)). April 17, 2013. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2013-0167+0+DOC+PDF+V0//EN> (Last retrieved on July 30, 2013).

⁶ *Ibid.*

⁷ See Reporters Without Borders, *2013 World Press Freedom Index*. Available at:

On April 18, 2013, the European Parliament approved a resolution⁸ on the human rights situation in Kazakhstan, in which it “strongly” criticized the banning of opposition parties and key independent media actors in the country; called on the government to respect the Organization for Security and Cooperation in Europe (OSCE) standards on freedom of expression; reiterated its concern over the detention of opposition leaders, journalists, and lawyers on the basis of trials that fall short of international standards; and reaffirmed its call to release all persons convicted on the basis of vague criminal charges that could be considered to be politically motivated—including Vladimir Kozlov, Vadim Kuramshin, and Roza Tuletaeva—among other significant issues.

Kazakhstan is considered “one of the world’s most repressive States” and ranks 160 out of 179 countries in the latest World Press Freedom Index by Reporters Without Borders.⁹

B. Acts of the State

a. Court findings on extremist speech by several media outlets, as part of the Kozlov, Aminov, and Sapargali decision of October 8, 2012¹⁰

On January 23, 2012, Vladimir Kozlov, leader of the unregistered opposition party *Alga*, was detained on suspicion of committing the crime of “incitement to social, national, tribal, racial, or religious enmity” (Article 164, KCC), for distributing literature and other media products “promoting social discord” and “entailing grave consequences,” in the aftermath of the Zhanaozen strike. Kozlov was initially detained for two months, but the Almaty Court No. 1 extended his detention period four times—on March 19, April 16, May 11, and June 14, each time for one month.¹¹

http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf (Last retrieved on July 30, 2013).

See also Freedom House, *Freedom in the World 2013: Democratic Breakthroughs in the Balance*. Available at:

http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet%20-%20for%20Web_0.pdf

(Last retrieved on July 30, 2013).

⁸ See supra note 5.

⁹ See supra note 7.

¹⁰ The authors’ citation in this section of several excerpts of the decision by the Aktau City Court in the case of Kozlov, Aminov and Sapargali (hereinafter, the Kozlov decision) should not be construed as the authors’ recognition of the accuracy of all facts relevant to the case as established by the court. Instead, as is further analyzed in Section D of this report, the citation is meant to transparently show the reader how broadly, liberally, and disproportionately the court decided that specific instances of legitimate political speech uttered and published by the media through several months with respect to the Zhanaozen strike had “incited” the specific violent clash between protesters and the police on December 16. See Section D of this report.

¹¹ See news report from the BBC, from October 8, 2012, “Kazakhstan opposition leader jailed.” Available at: <http://www.bbc.co.uk/news/world-asia-19873237> (Last retrieved on July 30, 2013). See news release from Human Rights House Network, from October 18, 2012, “Kazakhstan opposition leader sentenced in politically motivated trial.” Available at:

On August 16, a public prosecutor filed an indictment with the Aktau City Court accusing Kozlov, along with Akzhanat Aminov and Serik Sapargali, of committing the crimes of “incitement to social, national, tribal, racial, or religious enmity” (Article 164, KCC), “exhortations for the forcible overthrow or changing of the constitutional order, or forcible disruption of the territorial integrity of the Republic of Kazakhstan” (Article 170, KCC), and “the creation and guidance of an organized criminal group or criminal association, and participation in a criminal association” (Article 235, KCC).¹²

In its October 8, 2012 decision¹³ on the case of Kozlov, Aminov, and Sapargali (hereinafter, the Kozlov decision),¹⁴ the Aktau City Court ruled that:¹⁵

<http://humanrightshouse.org/Articles/18751.html> (Last retrieved on July 30, 2013).

¹² See Freedom House, “Kozlov Case File: Final Monitoring Report on the Trial of Vladimir Kozlov, Akzhanat Aminov, and Serik Sapargali,” December 2012. Available at:

<http://www.freedomhouse.org/sites/default/files/Final%20Monitoring%20Report%20-%20Kozlov%20Trial.pdf> (Last retrieved on July 30, 2013).

¹³ Excerpts from the Aktau City Court decision in the case of Vladimir Kozlov and others are cited in this section only to the extent that this decision constitutes the initial act of the State of Kazakhstan on which later acts were based in order to shut down the media outlets analyzed in this report. See Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Conduct of organs of a State: 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State; 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”)

¹⁴ Aktau City Court. Decision on Behalf of the Republic of Kazakhstan on the case of Vladimir Kozlov, Akzhanat Aminov and Serik Sapargali. October 8, 2012. Available in English at: <http://humanrightsfoundation.org/documents/Decision%20on%20the%20case%20of%20V.I.Kozlov%20et%20al.%20English.pdf>

(Last retrieved on July 30, 2013).

Available in Russian at:

<http://humanrightsfoundation.org/documents/Kozlov%20court%20decision%20Russian.pdf>

(Last retrieved on July 30, 2013).

¹⁵ For analyses focusing on the Kozlov decision, see reports by the several human rights organizations that monitored the Kozlov trial. Specifically, see Freedom House’s report on the trial, cited on footnote 11:

“...The verdict failed to establish several key facts, instead relying on broad interpretations of the law to give criminal character to normal political activities like distributing leaflets, making speeches, and organizing protests [...] At no point in the trial did the prosecution present a single instance when Kozlov publicly called for violent actions or a violent seizure of power. [...] The court failed to establish how the actions of the accused led to the events of December 16, 2011. [...] With these facts in mind, it appears highly likely that the trial had political purposes, namely 1) to create a legal precedent for the repression of opposition political parties and media outlets...”

Similarly, The Solicitors’ International Human Rights Group report on the trial concluded that:

“... It was incumbent upon the Court to provide to the accused a full explanation of the legal basis for the verdicts. There was a failure to do so. The failure to do so renders the trial of Kozlov unfair [...] In the opinion of the observers the verdicts of guilty against Kozlov were

[Kozlov was responsible], along with A. Amirova, for the distribution of publications and broadcasts by the *K-plyus* satellite TV channel and the Internet-based channel *Stan TV* (both radicalized by M. Ablyazov),¹³ the Internet website affiliated with them; the *Respublika*, *Vzglyad*, *Golos Respubliki*, and *Pravda Kazakhstana* newspapers; as well as the dissemination of leaflets and other printed media containing elements of incitement to social enmity and discord. These took the form of: negative descriptions of the authorities in Kazakhstan; statements creating a negative picture and stereotype of the government; and inciting the participants of the illegal industrial action to carry out violent acts against the authorities. V. Kozlov's duties also included: organizing a targeted search and selection of the employees of the city-forming enterprises that were

not justified by either the evidence presented to the Court or the reasoning in the final Judgment [...] [T]he Judge reached flawed verdicts. His Judgment included misleading impressions of the evidence. He failed to properly justify the Court's verdicts in law or fact. The Judge accepted opinion evidence of Prosecution witnesses on the ultimate issues of guilt without any evaluation of his own. Thus he demonstrably lacked independence from the Prosecution [...] The 43 page Judgment displays a consistent hostility to any criticism of the authorities. It would not be unreasonable to infer that there was or might have been direct hidden political influence bearing upon the Judge that led him to the disputed verdicts in the manner he did. Whether there was political control over the Judge is not a matter that we can be certain about."

The report also addressed the issue of independence of the judiciary in the country:

"...If Kazakhstan wishes to establish confidence in its legal system the judges must be independent and be seen to be independent from those in control of the executive power. Judicial independence is demonstrated through properly reasoned verdicts justified in law and by the evidence..."

See also Solicitors' International Human Rights Group, Trial Observation Report: The Republic of Kazakhstan v. Vladimir Kozlov, Seryck Sapargali and Akzhanat Aminov. November 2012. Available at:

<https://docs.google.com/viewer?a=v&pid=sites&srcid=c2locmcub3JnfHNvbGljaXRvcnMtaW50ZXJuYXRpb25hbC1odW1hbi1yaWdodHMtZ3JvdXB8Z3g6NDg4NDQwNGUyNjIxYzdlMA>

(Last retrieved on July 30, 2013).

Human Rights Watch's report on violations of labor rights in Kazakhstan's oil sector, cited on footnote 2, included the following recommendations regarding the misuse of overbroad criminal laws by the government of Kazakhstan:

"Immediately cease misusing overbroad and vague criminal legislation, such as the charge of 'inciting social discord' or 'calling for the forcible overthrow of the constitutional order' to detain and arrest labor activists and others who advocate for and disseminate information about labor rights. Repeal or amend the offence of 'inciting social discord' under article 164 of Kazakhstan's Criminal Code so that it complies with international human rights law. Ensure an impartial and fair trial of unregistered opposition Alga! party leader Vladimir Kozlov, opposition activist Serik Sapargali, and oil worker Akzhanat Aminov."

See also Amnesty International, Report 2013: The State of the World's Human Rights. Page 144. Available at:

<http://files.amnesty.org/air13/AmnestyInternationalAnnualReport2013completeen.pdf>

(Last retrieved on July 30, 2013).

susceptible to brainwashing and management by other persons; appointing and training activists-provocateurs from among them; teaching them to direct labor conflicts into the political realm and to create situations leading to conflicts, open hatred, clashes, violence, demolition and destruction of property; and provisioning financial support for the undertaken activity. These activities were conducted from their office in Zhanaozen.

On March 15, 2010, the defendant, V. Kozlov, came to the town of Zhanaozen of the Mangistau Province in order to carry out activities aimed at undermining the social and political foundations of the constitutional order of the Republic of Kazakhstan. During this trip, he used the existing situation to fulfill his criminal aspirations, spoke to protesters and promised to provide them with the support of lawyers, economists and analysts, and stated that he was against the authorities. He promised to publish his conclusions regarding their socio-economic difficulties in the mass media.

In addition, in order to promote social enmity and discord, the defendant Kozlov made a public address during a visit to the production branch *OzenMunayGaz*. He set the protesters against their employers and State authorities, declaring that in many Kazakhstani regions people live in poor conditions and suggested that they might rise up in support of the oil workers. According to his speech, the authorities wanted to suppress and strangle the protests of the oil workers out of fear of an uprising. Thus, Kozlov proved his close ideological and financial ties with radicalized extremist media projects, controlled by and affiliated with M. Ablyazov, who had previously established the organized criminal group. Kozlov made a promise to provide the assistance of lawyers, economists, analysts, as well as financial support. Moreover, he suggested that participants of the protest use the radicalized media outlets; in particular the *K-plyus* TV channel and the *Stan TV* Internet TV station affiliated with it, as well as the printed newspapers *Respublika* and *Vzglyad*.

In January 2011, after the defendant A. Aminov was arrested and became the subject of criminal prosecution, V. Kozlov assumed leadership of the organized criminal group that A. Aminov had established in the city of Zhanaozen in order to incite social enmity and discord.

Taking advantage of this situation, the defendant, V. Kozlov, fulfilled his instructions regarding the city of Zhanaozen with the aid of A. Amirova, Zh. Saktaganova, A. Ungarbayeva and A. Iskenderov. With their help, he carried out the work of both the *Alga* People's Party and the *Khalyk maidany* social movement. Kozlov also distributed among the strikers the afore-mentioned radicalized newspapers *Respublika* and *Vzglyad*, leaflets, and other printed materials aimed at inciting social enmity and discord, undermining State security, and calling for a violent overthrow of the constitutional order. He also provided other supplies such as sleeping bags, tents, and outdoor clothing for protection from the rain.

...

The defendant, V. Kozlov, undertook criminal actions aimed at undermining and destroying the socio-political foundations of the constitutional order of the Republic of Kazakhstan by the end of 2011. He did so by providing

leadership to organized criminal groups of an extremist nature posing under the names of *Alga* People's Party and the *Khalyk maidany* social movement, and through the members of these groups.

In 2011, media outlets controlled by the leaders of the organized criminal group (the TV channel *K-plyus*, the Internet-based *Stan TV*, and the newspapers *Respublika* and *Vzglyad*) were used to distribute numerous materials with content aimed at inciting social enmity and discord, calling for the violent seizure of power, the undermining of national security, and the violent overthrow of the constitutional order.

In a June 17, 2011, interview for the affiliated newspaper *Golos Respubliki*, the defendant, V. Kozlov, claimed to have close ties with the oil workers, promised to bring the unlawful protest to the attention of the European Parliament, and publicly acknowledged his criminal acts in connection with the broadcast on television and publication in print media of materials aimed at inciting social enmity and discord. The materials were aimed at creating a negative image of the employer and the government as enemies of the strikers, propagandizing the violent overthrow of the government, a violent change of the constitutional order, and the undermining of national security.

V. Kozlov used the political association *Khalyk maidany*, established under the auspices of the *Alga* People's Party, to create a negative image of the government. Through the members of the organized criminal group, he arranged distribution and delivery of printed materials with the logos of *Respublika*, *Vzglyad*, *Dat*, and the *K-plyus* TV channel, including leaflets that stated, "Ardakty agaiyn! Kasiyetti Mangystau elinin kureskerleri!" ("Warriors of the sacred land of Mangystau!"), and "Koter Basyndy, kazak, zhelkendegi zhendetti tucir!" ("Get up off your knees, Kazakhs, throw the tyrant and the thief off your neck!"). The materials contained elements of incitement to social enmity and discord in the form of the negative characterization of the Kazakhstani authorities, as well as other publications of the radical content that served to instigate participation in the illegal protest against the government.

...

During the main trial, witness Ayzhangul Amirova testified that the activities of the *Alga* party were directly supervised and controlled by V. Kozlov. In May 2011, Kozlov electronically sent her a brochure entitled: "Skillful organization of mass disorders." In September 2011, she distributed among the oil workers in Zhanaozen leaflets entitled, "Kasiyetti Mangystau elinin kureskerleri!" and "Koter Basyndy, kazak, zhelkendegi zhendetti tucir!" that had been sent to her from Almaty. In addition, V. Kozlov sent her the newspapers *Vzglyad*, *Golos Respubliki*, and *Pravda Kazakhstana*. She, along with A. Lukmanov and A. Iskenderov, used their vehicles to distribute these print products in the city of Zhanaozen. Previously, V. Kozlov sent her the electronic versions of these leaflets, which she was expected to duplicate and distribute among the oil workers.

Zh. Saktaganova, having read the content of the leaflets, said, "Is he calling us to war? Ayzhan, don't copy them, we don't need this." The workers in the square came to her after seeing the leaflets, and, using language that is

inappropriate for publication, said, “He is calling us to war.” The mood of the workers at that time was very tense. During the oil workers strike in Zhanaozen, V. Kozlov turned a labor dispute into a political event, having sent B. Atabayev and Zh. Mamai there, and encouraged the workers to take up an irreconcilable attitude toward the local authorities and their employers. In mid-August 2011, when Zh. Mamai arrived from Moscow, Zh. Saktaganova had been in custody for 10 days, during which time, upon V. Kozlov’s instructions, she kept the 10,000 U.S. dollars held by Mamai, and used them to fund the office’s needs. Having arrived during the strike in Zhanaozen, journalists from *K-plyus* and the *Respublika* newspaper systematically published and broadcasted biased materials, pitting the oil workers against the authorities. Organizational activities of the *Alga* party in Zhanaozen were funded in the amount of 4 million KZT, 1,000 U.S. dollars, and 4,000 Euros. All of these funds were transferred to Saktaganova via V. Kozlov. The *Alga* party led by V. Kozlov politicized the labor dispute between the employer and the oil workers, which resulted in the serious consequences of December 16, 2011, for which Saktaganova showed remorse.

...

According to the conclusions of the comprehensive forensic, psychological and linguistic examination No. 2054, conducted on June 1, 2012, the telephone transcripts, electronic correspondence, recordings, public speeches of the aforementioned persons, leaflets and other materials submitted to the court contained propaganda constituting incitement to social enmity and discord, to undermine State security, to the violent overthrow of the constitutional order and seizure of power.

...

In addition, analysis of the materials submitted for study specifically determined the unity of the political objectives and activities, as well as subordination to M. Ablyazov of the *K-plyus* TV channel; the Internet portals *Stan TV* and *Respublika*; the newspapers *Vzglyad* and *Golos Respubliki*; the unregistered party *Alga*, and the civil movement *Khalyk maidany*.

Analysis of the materials submitted for study showed that the content of the materials on the *K-plyus* TV channel, the Internet portals *Stan TV*, and *Respublika*, and the newspapers *Respublika*, *Golos Respubliki*, and *Vzglyad* were aimed at inciting social enmity and that M. Ablyazov was the architect of this policy.

Analysis of the content of the broadcasts on the TV channel *K-plyus*, articles in the newspapers *Vzglyad* and *Golos Respubliki*, *Respublika* and *Stan TV* Internet portals, and other materials, proved that they contained propaganda calling for the violent seizure of power and the undermining of national security.

Politological analysis of the aforementioned materials established that they contained signs of political extremism aimed at undermining and destroying the social and political foundations of the constitutional order of the Republic of Kazakhstan, and, therefore, served as the cause of the riots of December 16, 2011 (vol. 30, file pages 64-180, vol. 31, file pages 1-175).

...

At the trial, expert witness D. Mambekova confirmed the opinion of expert A. Svankulov. According to a linguistic examination of the articles authored by M. Ablyazov entitled, “You have to choose your own government” (August 23, 2011), “Get up off your knees, Kazakhs, throw the tyrant and thief off your neck” (September 19, 2011), and “It is time to overcome fear and act!” (September 23, 2011); these articles propagandized violent seizure of power, violent change of the constitutional order, undermining of national security, violent breach of the integrity of the Republic of Kazakhstan and the unity of its territory (vol. 33, pages 1-20).

...
During a comprehensive examination, it was established that the *K-plyus* TV channel broadcasts featuring speeches by M. Ablyazov, contributed to the creation of a negative public attitude toward the authorities and the political and economic situation of the State.

...
Thus, the court came to the conclusion that the criminal acts of V. Kozlov were properly qualified by the investigatory authorities according to articles 235 Part 1, 164 Part 3, 170 Part 2 of the Criminal Code of the Republic of Kazakhstan.

Vladimir Kozlov was found guilty and sentenced to seven and a half years in prison. On November 19, 2012, the Appeal Board of Mangistau Regional Court dismissed Kozlov’s appeal and confirmed his conviction and sentence. On March 13, 2013, the court of cassation also upheld the decision of the lower court and refused to grant the appeal.¹⁶

b. The attorney general’s office requests that the Almaty court apply the Kozlov decision’s findings and ban all infringing media

On November 20, Kazakhstan’s attorney general’s office announced that it had asked an Almaty court for a sweeping ban against eight newspapers and 23 websites, including the *Respublika* newspaper and associated websites and media outlets;¹⁷ *Vzglyad*

¹⁶ See news release from *Open Dialog Foundation* from November 20, 2012, “Court rejects an appeal by Vladimir Kozlov.” Available at:

http://odfoundation.eu/en/publications/1074/court_rejects_an_appeal_by_vladimir_kozlov (Last retrieved on July 30, 2013).

See news release from *Open Dialog Foundation* from March 18, 2013, “Vladimir Kozlov’s case: Court of Cassation upholds the verdict of the lower court.” Available at:

http://www.odfoundation.eu/en/publications/1189/vladimir_kozlovs_case_court_of_cassation_upholds_the_verdict_of_the_lower_court (Last retrieved on July 30, 2013).

¹⁷ *Golos respubliki - kaleidoskop sobytiy nedeli, Respublika. Delovoe obozrenie – dubl’ 2, Moya respublika. Fakti, sobytiya, lyudi, Respublika - NEW - informatsionno-analiticheskiy yezhenedelnik, Vsyaz Respublika, Moi dom - Respublika. Obzor sobytiy nedeli, Respublika 2030 - Delovaya gazeta, Respublikanskije vesti - delovoe obozrenie*, along with Internet websites:

www.facebook.com/RESPUBLIKA.kz

www.facebook.com/respublika.kaz

newspaper (whose editor Igor Vinyavskiy was arrested in the post-Zhanaozen crackdown, along with Vladimir Kozlov, but was later granted amnesty); *Pravda Kazakhstana* newspaper; the *K-plyus* satellite TV channel; and the Internet TV station *Stan TV*.

The attorney general's office based its request on Article 1(5) of Kazakhstan's Law on Countermeasures Against Extremism, which states that incitement to social discord and propaganda of violent government take-over is a form of extremism;¹⁸ Article 5(6) and Article 22(5)(2) of the Law on National Security of the Republic of Kazakhstan, which ban activities aimed at incitement to social discord which fall in the category of national security threats, and the distribution of materials undermining national security;¹⁹ Article 20(3) and Article 39(2) of the Constitution of the Republic of

www.twitter.com/#/respublika_kaz
www.respublika-kz.blogspot.com
www.plus.google.com/117818551347405307351
www.respublika-kaz.info
www.respublika.yvision.kz
www.respubliki.net
www.respublika-kaz.livejournal.com
www.respublika-kaz.biz
www.respublika-kaz.ya.ru
www.respublikakaz.info
www.respublika-kz.com
www.respublika-d2.com
www.respublika-d2.info
www.respublika-kz.info
www.respublika-kaz.net
www.respublika-kaz.ya.ru/index_blog.xml
www.youtube.com/user/ForumRespubliki
www.pressa.ru/izdanie/49968
www.o53xo.oisxg4dvmiwgs23bfvvtjnzgt6.xorod/ru
www.respublikakz.wordpress.com

¹⁸ See Law on Countermeasures against Extremism, article 1, Section 5 (Extremism - organization and/or execution by a natural person and/or by a legal entity, by an association of natural persons and/or legal entities on behalf of an organization that was declared extremist; natural person and/or by a legal entity, by an association of natural persons and/or legal entities that have extremist intent of: violent change of the constitutional order of the Republic of Kazakhstan, breach of its sovereignty and integrity, inviolability and inalienability of its territories, undermining the national security and defensive capacity of the State, violent seizure of power and violent retention of power; creation, management, and participation in paramilitary formation; organization and participation in an armed rebellion; incitement of social or class discord [political extremism]; incitement of or racial, national, and clan discord, including that involving violence and calls to violence [national extremism]; incitement of religious enmity and discord, including that involving violence and calls to violence, as well as application of any religious practice that can threaten the security, life, health, morality, and rights and freedoms of the citizens [religious extremism]).

¹⁹ See Law on National Security of the Republic of Kazakhstan, article 5 section 6 (Threats to national security of the Republic of Kazakhstan are: political extremism in any form, including inciting social, racial, ethnic, religious, class and tribal enmity or hatred).

Kazakhstan, which prohibit all propaganda and activism promoting the violent change of the constitutional system, as well as propaganda of social, national, class, or tribal superiority, and any actions capable of upsetting inter-ethnic peace;²⁰ and Article 1, Article 24(3) and Article 14(4) of the Law on Mass Media, according to which, among other things, a video Internet portal is considered a medium of production of mass information, and the information it hosts is a product of mass media.²¹

See Law on National Security of the Republic of Kazakhstan, article 22 section 5 sub-section 2 (Prohibited: the spread on the territory of the Republic of Kazakhstan printed materials and products of the foreign media, the contents of which undermine national security).

²⁰ See Constitution of the Republic of Kazakhstan, article 20 section 3 (Propaganda of or agitation for the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of State security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence shall not be allowed).

See Constitution of the Republic of Kazakhstan, article 39 section 2 (Any actions capable of upsetting interethnic concord shall be deemed unconstitutional).

²¹ See Law on Mass Media, article 1 (The following concepts are used in the present Law: 1. Accreditation is a procedure of appointment of a journalist and acknowledgement of his authorities by State body, public association and organization; 2. Editor-in-chief (editor) is a natural person who heads mass medium editorial office and possesses of respective rights for its issue, dissemination and broadcasting; 3. Mass information is printed, audiovisual and other messages and materials intended for an unlimited group of people; 4. Mass medium is a periodical print edition, radio and TV program, cinema documentary, audio visual recording and other form of periodical and continuous public dissemination of mass information, including WEB-sites in public telecommunication networks (Internet and other); 5. Product of a mass medium is circulation or part of circulation of a separate issue of a print edition or audio visual program, a separate issue of a radio, TV or newsreel program, information, placed on WEB-site in public telecommunication networks; 6. Authorized body on mass media affairs (further authorized body) is a central executive body, which fulfills State regulation of activity of mass media and information agencies; 7. Dissemination of mass medium product is sales (subscription, delivery, distribution) of periodical print editions, broadcasting of radio and TV programs, demonstration of newsreel programs; 8. Mass medium editorial office is a natural person or creative group, which is a structural subdivision of a legal person and that maintains collection and preparation of materials for a mass medium on the basis of labor agreement or other contract relations; 9. Journalist (mass medium representative) is a natural person maintaining activity on collection, processing and preparation of messages and materials for the mass medium on the basis of labor agreement or other contract relations; 10. Complex is a totality of buildings, connected by common earmarking and constituting a unified structure; 11. Periodical print edition is a newspaper, magazine, almanac, bulletin, appendixes to them that have a permanent name, current number and that are issued at least once in every three months; 12. Video products of pornographic and sexual character, naturalistic, detailed demonstration of genitalia or of a sexual act; 13. Official statement is information provided by government bodies and intended for further dissemination via mass media; 14. Information promoting suicide; 15. Distributor is a natural or legal person who maintains dissemination of a mass medium product on the basis of agreement with its owner, publisher or on other legal basis; 16. TV, radio, video, newsreel program that is an aggregate of periodical audio visual messages and programs, formed for consequent broadcasting/retranslation; 17. TV, radio, cinema program, complete part of TV or radio channel, which has a specific name, volume of broadcasting, and can be used independently from the other parts of the TV or radio channel; 18. Censorship is a preliminary concordance of messages and materials prepared by mass media with government bodies, officials and other

Finally, the attorney general's office based its request on Article 13 and Article 2(3) of Kazakhstan's Law on Mass Media to call for the "suspension and termination of issue (broadcasting)" when mass media is used for "propaganda or agitation of forced change of constitutional order, infringement of integrity of the Republic of Kazakhstan, detriment of national security; war, social, racial, national, religious, class or patrimonial superiority, cult of cruelty and violence, pornography and dissemination of data consisting of State secrets of the Republic of Kazakhstan and other registered secrets."

c. Based on the Kozlov decision, the Almaty courts ban all broadcasts by *K-plyus* and *Stan TV*, and all publications by *Respublika* and *Vzglyad*, including all associated websites

In a series of decisions handed down in December 2012, two Almaty district courts²² granted the attorney general's office request and, based on the aforementioned expert witness opinions in the Kozlov decision, banned *all* broadcasts by *K-plyus* and *Stan TV* and *all* publications by *Respublika* and *Vzglyad*, including all associated websites.

In all four cases, the courts cited excerpts from articles and specific TV utterances by each media outlet, all of which had already been reviewed by the Aktau court in the Kozlov decision and had been found to constitute incitement. Then, all of the courts argued that, under Article 71(3) of the Code of Civil Procedure of the Republic of Kazakhstan,²³ the criminal decision in the Kozlov case was binding upon them, as civil

organizations at their demand or on other basis with an intention to restrict or impose prohibition to disseminate messages and materials or their separate parts; 19. Broadcasting is transmission of TV, radio programs, audiovisual recording with usage of analogous and digital electromagnetic systems; 20. Erotic material product is a print edition or TV, radio program that broadcast sexual activities, private parts of human bodies, except for the genitalia, and do not contain elements of pornography.

See Law on Mass Media, article 24 section 3 (Dissemination of products of foreign mass media, which violate the Constitution of the Republic of Kazakhstan and norms of the present law, is prohibited in legal form. Access to foreign mass mediums in a form of Internet resources, which violate the Constitution of the Republic of Kazakhstan and norms of the present law, is suspended on the territory of the Republic of Kazakhstan).

See Law on Mass Media, article 14 section 4 (Hindering mass medium distribution accomplished on legal basis by natural persons or legal entities as well as by government officials, illegal confiscation and extermination of circulation or its part shall not be admissible other than on the basis of decision in legal force).

²² The *K-plyus*, *Stan TV*, and *Vzglyad* decisions were handed down by the Bostandyk District Court, while the *Respublika* decision was handed down by the Medeu District Court—both from the city of Almaty.

²³ See Code of Civil Procedure, article 71 section 3 (The court verdict on a criminal case which rules to satisfy the claim and has taken effect, is obligatory for the court which investigates the case about civil consequences of the defendant's deeds. The court verdict which has taken effect is obligatory for the court that investigates such civil case, as well as for the questions on whether

courts, to the extent that the cases they were presiding over dealt with “circumstances already adjudicated in the criminal decision and their legal evaluation.”²⁴

The courts based their decisions on a study of the Kozlov case’s expert witness opinions, called the psycho-philological study No. 2054 of June 1, 2012, which was carried out by “experts from the regional forensic research and development laboratory—a division of the Ministry of Justice of the Republic of Kazakhstan.”

As seen above, this expert study found: (1) the presence of propaganda constituting incitement to social enmity and discord, the violent overthrow of the constitutional order and seizure of power, and the undermining of State security; (2) unity of the political objectives and overall activities of the media and Kozlov’s subversive intentions; (3) that the content of the broadcasts on television and the articles in the newspapers was aimed at inciting social enmity; (4) the content of the television broadcasts and the newspaper articles contained propaganda calling for the violent seizure of power and the undermining of national security; and (5) media materials that contained signs of political extremism, aimed at undermining and destroying the social and political foundations of the constitutional order of the Republic of Kazakhstan, and, therefore, served as the cause of the riots of December 16, 2011.

Based on this study and the abovementioned legal provisions in Kazakhstan’s Constitution, as well as the Law on Countermeasures against Extremism, the Law on National Security of the Republic of Kazakhstan and the Law on Mass Media, the courts

the deeds were committed, whether they were committed by the defendant, as well as in regards to the other circumstances of the case and their legal evaluation established in the verdict.).

²⁴ Bostandyk District Court. Decision on Behalf of the Republic of Kazakhstan on the case of *K-plyus*. December 12, 2012. Available in English at:

<http://humanrightsfoundation.org/documents/Decision%20on%20the%20case%20of%20K-plyus%20English.pdf>

(Last retrieved on July 30, 2013).

Available in Russian at: <http://humanrightsfoundation.org/documents/K-plyus%20court%20decision%20Russian.pdf>

(Last retrieved on July 30, 2013).

Bostandyk District Court. Decision on Behalf of the Republic of Kazakhstan on the case of the newspaper *Vzglyad*. December 20, 2012. Available in English at:

<http://humanrightsfoundation.org/documents/Decision%20on%20the%20case%20of%20Vzglyad%20English.pdf>

(Last retrieved on July 30, 2013).

Available in Russian at:

<http://humanrightsfoundation.org/documents/Vzglyad%20Decision%20Russian.pdf>

(Last retrieved on July 30, 2013).

Medeu District Court. Decision on Behalf of the Republic of Kazakhstan on the case of the *Respublika*. December 25, 2012. Available in English at:

<http://humanrightsfoundation.org/documents/Respublika%20decision%20English.pdf>

(Last retrieved on July 30, 2013).

Available in Russian at:

<http://humanrightsfoundation.org/documents/Respublika%20court%20decision%20Russian.pdf>

(Last retrieved on July 30, 2013).

granted the attorney general's request and ruled to terminate and ban all broadcasts by *K-plyus* and *Stan TV*, and all publications by *Respublika* and *Vzglyad*, including all associated websites and Internet sources used for distributing any information from these media outlets.

C. International standard for the protection of the right to freedom of expression

The universal legal framework regarding the right to freedom of expression consists of Article 19 of the Universal Declaration on Human Rights, and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).²⁵ Kazakhstan ratified the ICCPR on November 28, 2005, and is bound by its provisions. According to articles 19 and 20 of the ICCPR, any restrictions to the right to freedom of expression must be narrowly tailored and necessary to achieve a significant government interest, such as prohibiting “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

a. Freedom to express opinions and ideas, even if these opinions “offend, shock, or disturb”

According to international law, “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” This includes the right of individuals to “hold opinions without interference.”²⁶

Regarding this subject, the United Nations Human Rights Committee (HRC)²⁷ stated:²⁸

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.^[29] They constitute the foundation stone for every free and democratic

²⁵ Other regional human rights instruments, such as the European Convention on Human Rights (ECHR)—to which Kazakhstan is not a State party—the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union, safeguard freedom of expression and grant a similar protection as the ICCPR.

²⁶ See article 19 of the International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

²⁷ The United Nations Human Rights Committee (HRC) is the body responsible for overseeing and advising ratified States on the implementation of International Covenant on Civil and Political Rights (ICCPR) treaty principles within that State. As of April 2012, 160 States had ratified the ICCPR. Available at: <http://www2.ohchr.org/english/bodies/hrc/>

²⁸ Ibid.

²⁹ See HRC, *Ali Benhadj v. Algeria*, communication No. 1173/2003, U.N. Doc. CCPR/C/90/D/1173/2003 (2007). Also, *Tae Hoon Park v. Republic of Korea*, communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (1998).

society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

...

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party.^[30]

In the judgment passed on the case of *Gauthier v. Canada* in 1999, the HRC declared:³¹

The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.

In 2010, the UN Special Rapporteur on Freedom of Opinion and Expression affirmed in his annual report that the scope of protection of the right to freedom of expression “includes expression of views and opinions that offend, shock or disturb.”³²

b. Prohibition against the criminalization of speech

i. General prohibition against the criminalization of speech

Regarding this subject, the HRC stated:

It is incompatible with paragraph 1 to criminalize the holding of an opinion.^[33] The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.^[34]

[...]

³⁰ See HRC, General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 4, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

³¹ See HRC, *Robert W. Gauthier v. Canada*, communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (1999).

³² See the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. May 16, 2011. Available at:

http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf

(Last retrieved on July 30, 2013).

³³ See HRC, *Robert Faurisson v. France*, communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

³⁴ See HRC, *Andre Alphonse Mpaka-Nsusu v. Zaire*, communication No. 157/1983 (26 March 1986), U.N. Doc. Supp. No. 40 (A/41/40) at 142 (1986).

Any form of effort to coerce the holding or not holding of any opinion is prohibited.^[35]

ii. Special prohibition against the criminalization of speech directed at public officials

In the judgment passed on the case of *Zeljko Bodrožić v. Serbia and Montenegro* in 2005, the HRC declared:³⁶

The Committee observes, moreover, that in circumstances of public debate in a democratic society, especially in the media, concerning figures in the political domain, the value placed by the Covenant upon uninhibited expression is particularly high.

[...]

The State...should ensure that no one is subjected to criminal charges or conviction for carrying out legitimate journalistic or investigative scientific work, within the terms covered by article 19 of the Covenant.^[37]

Similarly, in the case of *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, the HRC stated:³⁸

Freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their governments without fear of interference or punishment.

c. Freedom to disseminate opinions or ideas freely, through any medium whatsoever

The right to freedom of expression protects all forms of expression and the means of their dissemination.

³⁵See HRC, *Yong-Joo Kang v. Republic of Korea*, communication No. 878/1999, U.N. Doc. CCPR/C/78/D/878/1999 (2003).

³⁶See HRC, *Zeljko Bodrožić v. Serbia and Montenegro*, communication No. 1180/2003, U.N. Doc. CCPR/C/85/D/1180/2003 (2006).

³⁷See concluding observations of the Human Rights Committee: Russian Federation. 11/06/2003. CCPR/CO/79/RUS. Available at:

<http://www.unhcr.ch/tbs/doc.nsf/0/622c5ddc8c476dc4c1256e0c003c9758> (Last retrieved on July 30, 2013).

³⁸See HRC, *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, communications Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996).

Such forms include spoken, written, sign language, and such non-verbal expression as images and objects of art.³⁹

This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others,⁴⁰ including political discourse,⁴¹ commentary on one's own⁴² and public affairs,⁴³ canvassing,⁴⁴ discussion of human rights,⁴⁵ journalism,⁴⁶ cultural and artistic expression,⁴⁷ teaching,⁴⁸ and religious discourse.⁴⁹ Means of expression include books, newspapers,⁵⁰ pamphlets,⁵¹ posters, banners,⁵² dress, and legal submissions.⁵³ They also include all forms of audio-visual transmission as well as electronic and internet-based modes of expression.⁵⁴

d. Prohibition against any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence

Under article 20(2) of the ICCPR,⁵⁵ “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” (hereinafter, “incitement prohibition”). This prohibition is “fully compatible with the right of freedom of expression as contained in Article 19, the

³⁹See HRC, *Hak—Chul Shin v. Republic of Korea*, communication No. 926/2000, U.N. Doc. CCPR/C/80/D/926/2000 (2004).

⁴⁰See HRC, *Ballantyne, Davidson, McIntyre v. Canada*, communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

⁴¹See HRC, *Essono Mika Miha v. Equatorial Guinea*, communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

⁴²See HRC, *Anthony Fernando v. Sri Lanka*, communication No. 1189/2003, U.N. Doc. CCPR/C/83/D/1189/2003 (2005).

⁴³See HRC, *Patrick Coleman v. Australia*, communication No. 1157/2003, U.N. Doc. CCPR/C/87/D/1157/2003 (2006).

⁴⁴See Concluding observations on Japan (CCPR/C/JPN/CO/5).

⁴⁵See HRC, *Vladimir Velichkin v. Belarus*, communication No. 1022/2001, U.N. Doc. CCPR/C/85/D/1022/2001 (2005).

⁴⁶See HRC, *Rakhim Mavlonov and Shansiy Sa'di v. Uzbekistan*, communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004 (2009).

⁴⁷See *Supra* note.

⁴⁸See HRC, *Malcolm Ross v. Canada*, communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000).

⁴⁹*Ibid.*

⁵⁰See HRC, *Ernst Zundel v. Canada*, communication No. 1341/2005, U.N. Doc. CCPR/C/89/D/1341/2005 (2007).

⁵¹See HRC, *Vladimir Viktorovich Shchetko v. Belarus*, communication No. 1009/2001, U.N. Doc. CCPR/C/87/D/1009/2001 (2006).

⁵²See HRC, *Kivenmaa v. Finland*, communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).

⁵³*Ibid.*

⁵⁴See Human Rights Committee General Comment No. 34. Available at:

<http://www2.ohchr.org/english/bodies/hrc/comments.htm> (Last retrieved on July 30, 2013).

⁵⁵See ICCPR, Art. 20(2) (Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law).

exercise of which carries with it special duties and responsibilities.” For it to become effective, “there ought to be a law making it clear that ... advocacy as described [is] contrary to public policy and providing for an appropriate sanction in case of violation.”⁵⁶

According to HRC case law, “... restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”⁵⁷ Under this provision, “[a]ny restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law; it must address one of the aims set out in paragraph 3 (a) and (b) of article 19; and it must be necessary to achieve a legitimate purpose.”⁵⁸

i. Three-prong test to determine the validity of measures implementing the Article 20 incitement prohibition

Any restriction of freedom of expression implementing the Article 20 incitement prohibition requires compliance with the three-prong test set forth in Article 19(3):⁵⁹

(1) [It] must be provided by law, (2) it must address one of the aims set out in paragraph 3 (a) and (b) [of Article 19] (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and (3) it must be necessary to achieve a legitimate purpose.

HRC’s General Comment 34 breaks down the elements of the three-prong test that must be met in order to impose exceptional restrictions to freedom of expression:

⁵⁶ See HRC, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20). 29 July 1983. Available at:

<http://www2.ohchr.org/english/bodies/hrc/comments.htm> (Last retrieved on July 30, 2013).

⁵⁷ See HRC, Communication No 736/1997. *Ross v. Canada*. Views adopted on 18 October 2000. ¶ 10.6. Available at: http://www.bayefsky.com/pdf/165_canada736.pdf (Last retrieved on July 30, 2013).

⁵⁸ See HRC, Communication No. 550/1993. *Faurisson v. France*. Views adopted on 8 November 1996. ¶ 9.4. Available at:

http://www.bayefsky.com/pdf/128_francevws55058.pdf (Last retrieved on July 30, 2013).

HRC’s General Comment 34 elaborates on the links between articles 19 and 20 of the ICCPR: “50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3. 51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. 52. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.”

⁵⁹ *Ibid.*, ¶ 11.2.

22. Paragraph 3 [of Article 19] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.⁶⁰ Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.⁶¹

[...]

25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly⁶² and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.⁶³ Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

[...]

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that “restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.”⁶⁴ The principle of proportionality must also take

⁶⁰ See HRC, Communication No. 1022/2001. *Velichkin v. Belarus*. Views adopted on October 20, 2005. ¶ 7.3. Available at: http://www.bayefsky.com/pdf/belarus_t5_iccpr_1022_2001.pdf (Last retrieved on July 30, 2013).

⁶¹ See HRC, General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18). 30 July 1983. ¶ 8. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (Last retrieved on July 30, 2013).

⁶² See HRC, Communication No. 578/1994. *de Groot v. The Netherlands*. Views adopted on 14 July 1995. ¶ 4.6. Available at: http://www.bayefsky.com/pdf/150_netherlandsdec578.pdf (Last retrieved on July 30, 2013).

⁶³ See HRC, General Comment No. 27: Freedom of movement (Art.12). 2 November 1999. ¶ 13. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (Last retrieved on July 30, 2013).

⁶⁴ *Ibid*, ¶ 14 and 15.

See also HRC, Communication No. 1128/2002. *Marques v. Angola*. Views adopted on 29 March 2005. ¶ 6.8. Available at: http://www.bayefsky.com/pdf/angola_t5_iccpr_1128_2002.pdf (Last retrieved on July 30, 2013).

account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.⁶⁵

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁶⁶

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has detailed the three-prong test for incitement prohibition more specifically. According to the OHCHR:⁶⁷

Article 20 of the ICCPR requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such a threshold needs to be read in consonance with Article 19 of the ICCPR. Indeed the three-part test for restrictions (legality, proportionality and necessity) also applies to incitement cases, i.e. such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions: are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measures available; are not overly broad, in that they do not restrict speech in a wide or untargeted way; and are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorize.

See HRC, Communication No. 1157/2003. *Coleman v. Australia*. Views adopted on 17 July 2006. ¶ 7.3. Available at: http://www.bayefsky.com/pdf/australia_t5_iccpr_1157_2003.pdf (Last retrieved on July 30, 2013).

⁶⁵ See HRC, Communication No. 1180/2003. *Bodrozic v. Serbia and Montenegro*. Views adopted on 31 October 2005. ¶ 7.2. Available at: http://www.bayefsky.com/pdf/serbia_t5_iccpr_1180_2003.pdf (Last retrieved on July 30, 2013).

⁶⁶ See HRC, Communication No. 926/2000. *Shin v. Republic of Korea*. Decision adopted on 19 March 2004. ¶ 7.2 and 7.3. Available at: http://www.bayefsky.com/html/rokorea_t5_iccpr_926_2000.php (Last retrieved on July 30, 2013).

⁶⁷ See *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations emanating from the four regional expert workshops organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012*, paragraph 18. Available at: http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (Last retrieved on July 30, 2013).

D. Analysis of Kazakhstan’s conduct in relation to the international standard for the protection of the right to freedom of expression

As seen above, the right to freedom of expression protects all forms of expression and the means of their dissemination. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political discourse, commentary on one’s own and public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. Means of expression include books, newspapers, pamphlets, posters, banners, dress, and legal submissions. They also include all forms of audio-visual, electronic, and internet-based modes of expression. Under Article 20(2) of the ICCPR, “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” (incitement prohibition).

Under the ICCPR, government measures implementing the Article 20 incitement prohibition require a high threshold because, as a matter of fundamental principle, limitation of speech must always remain an exception. Such a threshold must be read in consonance with the Article 19(3) three-prong test for restrictions—namely, such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. Below, we analyze whether the court decisions that banned all broadcast by the television networks *K-plyus* and *Stan TV*, and all publications by the newspapers *Respublika* and *Vzglyad*, including all associated websites, on grounds of incitement, meet this test.

As seen above, in order for a legal provision prohibiting incitement to meet the three-prong test, this provision must be clearly and narrowly defined to protect a legitimate interest, must respond to a pressing social need, and must be the least intrusive measure in a democratic society to protect that interest. In particular, the legal provision must not be overly broad or restrict speech in a wide or untargeted way. Similarly, the principle of proportionality must be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. Proportionality must also consider the form of expression in question as well as the means of its dissemination. Furthermore, the value placed by the ICCPR upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain, even when this expression is offensive, shocking, or disturbing. As a result, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken—in particular by establishing a direct and immediate connection between the expression and the threat.

However, as seen above, Kazakhstan’s Law on Countermeasures against Extremism bans the broadly defined “incitement to social discord and propaganda of violent government take-over” as a form of “extremism.” Similarly, the Law on National Security of the Republic of Kazakhstan broadly states that “activities,” including the “distribution of materials” aimed at inciting the vaguely defined “social discord,” fall into

the category of “national security threats.” Finally, the Law on Mass Media disproportionately calls for the “suspension and termination of issue (broadcasting)” in those cases where mass media is used for “propaganda or agitation of forced change of constitutional order, infringement of integrity of the Republic of Kazakhstan, detriment of national security; war, social, racial, national, religious, class or patrimonial superiority, cult of cruelty and violence, pornography and dissemination of data forming State secrets of the Republic of Kazakhstan and other registered secrets.”

The aforementioned legal provisions are unclear, overly broad, and restrict speech in a wide or untargeted way, especially when this speech may be found to be offensive, shocking, disturbing, or merely critical of the government. They are not formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and instead confer arbitrary discretion for the restriction of freedom of expression on the prosecutors, judges, and law enforcement officials charged with their application and execution. Furthermore, the Almaty courts wrongfully relied on “expert psychophilological and politological studies” carried out by a government agency in a previous criminal case and broadly determined that a certain amount of material published or broadcast by the four media outlets analyzed in this report “contained signs of political extremism” and was tantamount to “propaganda constituting incitement to social enmity and discord, to the violent overthrow of the constitutional order and seizure of power and to undermining State security.”

As per the facts outlined above, the courts at all times failed to demonstrate that the aforementioned legal provisions were clearly and narrowly defined to protect a legitimate government interest and respond to a pressing social need, especially considering society’s interest in remaining informed and aware of news in the public domain, as well as the important role the media must play in a democratic society through broadcasting and publishing opinions and news about issues concerning figures in the public and political domain. Events in the public domain—such as the Zhanaozen labor strike and the protests that eventually led to the December 16 clashes and the deaths of many oil workers—are worthy of media coverage even when the information or opinions aired through these media may be considered offensive, shocking, or disturbing, let alone when they are merely critical of the government, as in the case at hand. At the time of applying these overly broad laws, the courts failed to demonstrate that banning the four media outlets analyzed herein, along with all their means of dissemination, was proportional to the alleged offense, in view of society’s interest for an open debate on public issues. The courts also failed to demonstrate that this decision was the least intrusive measure in a democratic society to protect that interest. Similarly, the courts failed to demonstrate in specific and individualized fashion the precise nature of the threat these four media outlets posed, and the necessity and proportionality of banning them completely. Finally, the courts failed to establish a direct and immediate connection between the expressions aired through these media outlets and the violence of December 16.

In summation, the speech restrictive measures adopted by the State of Kazakhstan in order to prohibit incitement failed to meet the three-prong test under the ICCPR. As a result, through these measures, the State of Kazakhstan violated the right of these media

outlets to disseminate information, as well as the public's right to receive such information.

E. Conclusion

The court decision to ban all publications, broadcasts, and dissemination of information by the newspapers *Respublika* and *Vzglyad* and the TV stations *K-plyus* and *Stan TV*, along with all associated websites, violates the right to freedom of expression of these media outlets, as well as the rights of the individuals publishing their opinions through them and the rights of the public to receive such information and opinions.

By failing the three-prong test for the legitimate prohibition of incitement, Kazakhstan violated the international standard for the protection of the right to freedom of expression. Specifically, Kazakhstan violated (1) the right of the media outlets to freely express opinions and ideas, even when these are offensive, shocking, or disturbing; (2) the general prohibition against the criminalization of expression, especially that directed at public officials; and (3) the right of the public to disseminate opinions or ideas freely, through any medium whatsoever.

This international standard is binding for Kazakhstan and has been since January 24, 2006, when the country ratified the International Covenant on Civil and Political Rights (ICCPR). Through its actions, Kazakhstan has failed, and continues to fail, to comply with its obligation to protect freedom of expression under the ICCPR.

In short, Kazakhstan is responsible for the violation of Articles 19 and 20 of the International Covenant on Civil and Political Rights, interpreted in accordance with the decisions of the UN Human Rights Committee.